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SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 898

NORTON D. McKINNEY,
Petitioner,

vs.

GEORGIA H. McKINNEY KELLEY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VERMONT

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BATAVIA, N. Y.

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IN THE

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No. .....

NORTON D. McKINNEY,

Petitioner,

vs.

GEORGIA H. McKINNEY KELLEY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VERMONT

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Vermont entered in the above entitled cause on March 20, 1958 which became final following the denial of petitioner's motion for reargument on March 5, 1958.

Opinions Below

The findings of fact and decision of the trial court, the opinion of the Vermont Supreme Court and its opinion denying reargument are, as yet, unreported (*McKinney* v. *Kelley,* 120 Vt. ___, ___; 139 A(2) ___, ___). Copies

thereof are submitted as a separate Appendix to this petition pursuant to Rule 23, 1, (a) (i). References herein are to page references in this Appendix.

Jurisdiction

Jurisdiction of this Court is invoked under 28 U. S. Code, Section 1257 (3) (62 Stat. 929) on the ground that the highest state court denied petitioner due process of law in violation of the Fourteenth Amendment and also denied full faith and credit to a final decree of the Connecticut Superior Court and to the statute and case law of that state in violation of Article IV, Section 1 of the Federal Constitution and 28 U. S. Code, Section 1738 (62 Stat. 947).

The final judgment of the Vermont Supreme Court sought to be reviewed is dated and was entered on March 20, 1958. The judgment recites that the judgment of the Rutland County Court (entered August 2, 1957) was affirmed on November 5, 1957, that petitioner's motion for reargument was denied on March 5, 1958 and that the Vermont Supreme Court issued its stay of the mandate on March 14, 1958 (pp. 16-19 *infra*).

Questions Presented For Review

1. Whether the highest Vermont court, by refusing to accept petitioner's uncontradicted, corroborated, competent and credible evidence establishing numerous substantial changes of circumstances since the 1953 custody decree which required its modification, denied petitioner due process of law;
2. Whether such court denied full faith and credit to the 1956 Connecticut decree which determined that re-

spondent's former paramour and present husband was unfit to have custody of his own three children;

3. Whether such court denied full faith and credit to the statute and case law of Connecticut establishing respondent's continued misconduct there subsequent to the 1953 Vermont custody decree;
4. Whether the Vermont decision is in conflict with the decisions of other state courts of last resort on a matter of public importance, namely, that the divorced wife's continued misconduct with and remarriage to the man who broke up the home constitute changes of circumstances requiring a change of custody from her to the child's innocent father.

Statutes and Constitutional Provisions Involved

The due process and full faith and credit clauses of the Constitution of the United States; 28 U. S. C. Sections 1257(3) and 1738; Connecticut G. S. (1949 revision) Sections 8545 and 8553; Vermont Statutes (1947 revision) Section 3252 (Appendix, pp. 32-33).

Statement of the Facts

The parties were married in New York, July 12, 1940 and had two children: Denman, born January 31, 1942, and Kirk, born October 27, 1944 (3). In 1945 they moved to Vermont where petitioner employed one Kay Francis Kelley in his business of raising small animals for laboratory purposes (3). In October 1950 respondent and Kelley went to New York together where they spent the night in a motel or cabin (4). On their return petitioner accused respondent of infidelity whereupon she left him in November, 1950, taking the infant Kirk with her first to New

York City and then to Detroit (4, 5). In September 1951 she left the child for a time in Detroit and rejoined Kelley in Connecticut (5). Petitioner thereupon sued her for a divorce in the County Court for Rutland County, Vermont, alleging both adultery and "intolerable severity" (5). When the libel was served on respondent, after midnight on January 24, 1952 in her apartment at Glastonbury, Connecticut, she and Kelley were found partially disrobed and during that month he was a nightly visitor there between the hours of midnight and 3:00 or 4:00 A. M. (7). These circumstances established adultery under both Connecticut (*Zeiner* v. *Zeiner*, 120 Conn. 161, 165) and Vermont law (*Raymond* v. *Raymond*, 120 Vt. 87). On June 28, 1952 Kelley finally deserted his own wife, Laura, and their three children, born in 1946, 1949 and 1951 respectively (7). She thereupon returned to her parents in Massachusetts with the children.

Trial of the contested Vermont divorce action, wherein respondent appeared generally by attorney, resulted in a decree on February 3, 1953 granting petitioner a divorce on the ground of "intolerable severity" (the adultery charge having been withdrawn in petitioner's then hope of a reconciliation), awarding respondent custody of Kirk, subject to reasonable visitation by petitioner, but denying her all alimony and counsel fees (5, 6). Petitioner has since complied fully with the provisions for Kirk's support (6), but has been refused his visitation rights by respondent who has since kept the child in Connecticut.

Petitioner visited respondent in Connecticut in the summer of 1953 (7) in hope of a reconciliation but learned from her that she was continuing her illicit relationship with Kelley, allegedly on the advice of a Hartford physician. The child was then badly cared for and in need of

clothing which petitioner provided. In December 1954 respondent removed him from Glastonbury, refusing to disclose his whereabouts to petitioner's investigator. On November 8, 1955 Kelley sued his wife, Laura, in the Connecticut Superior Court for Hartford County for a divorce, alleging "desertion", but when she filed a cross complaint on December 8, 1955 alleging his desertion of her and their three children on June 28, 1952, *supra*, Kelley withdrew his complaint and, on May 29, 1956, a final decree was entered in the Connecticut court, after a hearing on the cross complaint, awarding Laura a divorce, custody of their three children and directing Kelley to pay her $27.00 weekly for their support from his earnings of about $90.00 (7, 8, 9).

In June, 1956 Kelley lived with respondent in her apartment (then in East Hartford, Connecticut) and his own room nearby was unused. Despite the foregoing respondent married him on September 21, 1956 (8), again secreting Kirk from petitioner's investigator at Christmas in 1956. They were finally located in 1957 on a remote lake, 28 miles from East Hartford where Kelley and respondent are now employed, leaving the child, Kirk, "more or less" unattended during the day (9). Kirk now refers to Kelley as his "father" and to his only brother, Denman, who resides in Vermont with petitioner and his family in a very substantial home, as a "dummy" (9, 10).

On ascertaining these subsequent changes in circumstances petitioner, on January 7, 1957, instituted this proceeding under Vermont Statutes, Section 3252, for a modification of the 1953 custody decree and the award of Kirk's custody to him (12). The summons and petition were personally served on respondent in Connecticut, her

Vermont attorney and also her counsel then withdrew from the cause by leave of court, it was adjourned to enable her to procure new counsel and she thereupon wrote the court that she did not care to appear and defend, even though Connecticut would recognize and enforce a Vermont modification decree (2, 12) (*Freund* v. *Burns,* 131 Conn. 380; *Morrill* v. *Morrill,* 83 Conn. 479, 492)[1] Petitioner's undisputed evidence was finally presented on June 18, 1957, findings were made by the Vermont County Court on July 17, 1957 and his petition dismissed by a "judgment order" entered in that court on August 2, 1957.

On review by bill of exceptions to the Vermont Supreme Court, the highest state court, petitioner specifically excepted to the trial court's refusal to find, as requested, that Kelley had deserted his own family in 1952 on the ground that this had been determined by the prior Connecticut decree, which was entitled to full faith and credit under the Federal Constitution[2]. Petitioner likewise excepted to the refusal to find and apply the Connecticut law establishing respondent's continuing offenses of adultery and fornication there (Conn. G. S. Secs. 8545, 8553), also to the refusal to find, although established by undisputed evidence: respondent's present unfitness as custodian, the substantial changes in circumstances since the 1953 Vermont decree requiring a modification of its custody provisions in petitioner's favor, the alienation of the child by his new stepfather, the latter's adjudicated unfitness to be custodian of his own children, respondent's denial of petitioner's visitation rights under the 1953 decree, substantial

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[1] See *Halvey* v. *Halvey,* 330 U. S. 610, 621, note 8; *Restatement: Conflict of Laws,* Sec. 147.

[2] An exemplified copy of the Connecticut judgment roll was received in evidence (8) (*Kelley* v. *Kelley,* No. 104, 446-J, Conn. Supr. Ct., Hartford Co., Petr's Ex. 3).

changes in the conditions of the parties since that date and numerous other facts establishing beyond peradventure that the child's welfare would now best be served in petitioner's custody.

In affirming the judgment order of August 2, 1957 the highest state court summarily declined to review *all* of petitioner's twenty one briefed requests for these findings that had been refused below, noting that petitioner "has worked with a very fine brush, indeed" (16). Although the settled Vermont rule heretofore was that the statements of a credible witness are not to be arbitrarily disregarded or ignored, that when he testifies distinctly and positively on a fact, is not contradicted and there is no circumstance from which a contrary inference may be drawn, *that fact may be taken as established (Granite Creamery Co.* v. *Cheese Co.,* 115 Vt. 408, 413; *Brown* v. *Maryland Casualty Co.,* 111 Vt. 30, 35; *La Pierre* v. *Halpin,* 111 Vt. 193, 196; *Valenti* v. *Imperial Assurance Co.,* 107 Vt. 65, 69; *Neill* v. *Ward,* 103 Vt. 117, 160), all this was overturned by the state court holding here that petitioner's undisputed and corroborated evidence could be wholly disregarded; further, that such novel holding "has particular force and application to the hearing had here where only one side was represented and there was no one to challenge any particular assertion" (22) (cf. *Hammond Packing Co.* v. *Arkansas,* 212 U. S. 322, 331 *contra*). The case cited by the state court to support this extraordinary proposition (22) (*Miller* v. *Miller,* 89 Vt. 547, 549) on its face has no application to this situation but merely authorized discard of the testimony of a single witness who testifies two ways. That was not this case.

Petitioner could not anticipate this unprecedented action of the highest state court, contrary to its own prior deci-

sions *supra* (*Saunders* v. *Shaw*, 244 U. S. 317, 320). He thereupon seasonably raised the Federal Constitutional question of denial of due process by petition for rehearing (motion for reargument) (25). The state court then squarely ruled on this claimed denial of a federal right, holding that there had been no "arbitrary disregard" of petitioner's evidence and that there was "no merit" in his claim of a "plain denial of the right guaranteed petitioner by the Fourteenth Amendment to the United States Constitution" (30). The question thus is now open for review by this Court (*Staub* v. *City of Baxley*, 355 U. S. 313, 318-19 and cases cited, No. 48 October Term, 1957; *Missouri* v. *Gehner*, 281 U. S. 313, 320; *Truax* v. *Corrigan*, 257 U. S. 312, 324; *Kansas City So. Ry. Co.* v. *Albers Comm. Co.*, 223 U. S. 573, 591, 593; *Cedar Rapids Gas Light Co.* v. *Cedar Rapids*, 223 U. S. 665, 668).

Statement Under Rule 23, 1(f)

The federal question of denial of due process was seasonably raised, at the earliest opportunity, on petition for rehearing; it was considered and then denied by the highest state court. The federal question of denial of full faith and credit to the Connecticut decree was specifically raised on that ground by exception (No. 9 in the trial court) to the refusal to find the facts plainly established by that decree (Request No. 8). On appeal this exception to the refusal to find as requested was summarily dismissed on the ground the requested finding was "multiple in character" and also that it was "embedded in other elements which the requesting party is not entitled to have found" (16, 17). This is not so. The federal question of denial of full faith and credit to the cited Connecticut statute and case law was seasonably raised by exception (Nos. 25, 27)

in the trial court and wholly ignored by the state Supreme Court on appeal, although, under Vermont law, foreign law may be judicially noticed there (*Cukor* v. *Cukor,* 114 Vt. 456, 462).

The refusal to find facts established by the Connecticut decree on the ground that this request was "multiple" and contained elements which petitioner was "not entitled to have found" was a plain defiance of the full faith and credit clause and 28 U. S. C. Section 1738 (cf. *Cook* v. *Cook,* 342 U. S. 126, 128). The state court has decided these federal questions of substance in a way not in accord with the applicable decisions *infra* of this Court.

Reasons for Allowance of the Writ

This is not a "mere contest of property rights between two parties" (30) but a matter of human rights involving the welfare, education and upbringing—indeed the whole future—of a thirteen year old boy and future citizen (cf. *May* v. *Anderson,* 345 U. S. 528, 541). In that connection it was elementary to due process that petitioner was entitled to have his entire evidence fully and fairly considered (*Lispena* v. *California,* 314 U. S. 219, 236; *Georgia Ry. & El. Co.* v. *Decatur,* 295 U. S. 165, 171 and cases cited). The state court's refusal to find facts established by this undisputed proof which, if found, would require a transfer of custody to petitioner, presents questions for review by this court (*Barsky* v. *Board of Regents,* 347 U. S. 442, 454; *The E. A. Packer,* 140 U. S. 360, 365; *The City of New York,* 147 U. S. 72, 77).

In view of the importance to the state that its future citizens be clothed, nourished and suitably educated, considerations assumed by all civilized countries, it comes as

a surprise that any state "should, either by statute or judicial decree, so tie its own hands as to foreclose all future inquiry into the duty of maintenance, however affected by changed conditions" (*Yarborough* v. *Yarborough,* 290 U. S. 202, 220, 222). Accordingly it has been uniformly held throughout this nation that the wife's continued misconduct with her paramour subsequent to the divorce and her eventual marriage to the very man who broke up the home is a change of circumstances requiring a change of custody of the child to his innocent father (*Harbour* v. *Harbour,* 48 CA (2) 131, 119 P(2) 394; *Phillips* v. *Christensen,* 121 Col. 380, 216 P(2) 659; *Sherwood* v. *Sherwood,* 56 Ia. 608, 10 N. W. 98; *Serotzke* v. *Serotzke,* 335 Ill. A. 485, 82 N. E. (2) 375; *Johnson* v. *Fish,* 197 S. W. (2) 990 (Mo A.); *Watkins* v. *Watkins,* 230 S. W. (2) 778 (Mo. A.); *Pangle* v. *Pangle,* 134 Md. 166, 106 A. 337; *Neal* v. *Medcalf,* 244 S. W. (2) 666 (Tex. CA); *Conley* v. *St. Jacques,* 110 S. W. (2) 1238 (Tex. CA); *Allen* v. *Allen,* 38 Wash. (2) 128, 228 P(2) 151 (Wash.). This settled rule was dismissed by the highest Vermont court as "obscured by a spirit of retribution" (23). But certiorari will be granted to resolve a conflict between state courts of last resort (*Illinois* v. *United States,* 328 U. S. 8, 9).[3] The question is one of substantial public interest in which some uniformity among the states obviously is desirable and necessary (cf. *Halvey* v. *Halvey, supra,* 330 U. S. 610).

A federal right of due process is denied by the making of findings of fact without support in the evidence (*Creswell* v. *Knights of Pythias,* 225 U. S. 246, 261; *Ancient Egyptian Order* v. *Michaux,* 279 U. S. 737, 744-5). Here neither respondent nor the child were before the Vermont

[3] See also: Stern and Gressman: Supreme Court Practice (1950) p. 124.

court (cf. *Halvey* v. *Halvey, supra,* 330 U. S. 610, 613) consequently its finding that Kirk is now "happy, contented and well cared for in his present home" in Connecticut (11) is the very surmise, speculation and conjecture which Vermont herself previously had strongly condemned (*Raithel* v. *Hall,* 99 Vt. 65, 72; *Valiquette* v. *Smith,* 108 Vt. 128; *Avery* v. *Bender,* 119 Vt. 313, 331; cf. *Barsky v. Board of Regents, supra,* 347 U. S. 442, 454). On appeal the highest state court speculated further that the trial court "may well have considered" petitioner's lack of "superiority of character" (23) although the *only* evidence was that both his character and reputation were exemplary and that respondent's were not. On the reargument motion the state court then attempted to justify this entire disregard of petitioner's undisputed evidence by holding that it must be "weighed" in the light of his alleged "delay" (29)—from entry of the custody decree on February 3, 1953 to commencement of this modification proceeding on January 7, 1957 on the ground of the very changed circumstances *supra* which had taken place in that interim! The undisputed proof[4] was that petitioner consented to respondent's custody in 1953 on advice of local counsel in the unrealized hope of a reconciliation; that he thereafter sought her out in Connecticut only to learn that she was continuing her adulterous life with Kelley; that she concealed the child's whereabouts in Connecticut at Christmas in 1954 and again in 1956; that in 1956 Kelley was adjudicated by the Connecticut court to have deserted his own wife and three small children and denied their custody; that notwithstanding and despite religious differences respondent thereafter married him, although he had

[4] Since the facts are undisputed this court is at liberty to inquire whether they support the judgment (*Kelley* v. *Rhoads,* 188 U. S. 1, 5).

then broken up two homes and deserted his own family; that respondent has now exhausted her own resources and is obliged to leave the child unattended for her remote daily employment at $50 weekly, whereas petitioner's circumstances have now materially improved; that the unfit step parent, Kelley, has now alienated the child from his own father who has been denied even his legal right of visitation in a foreign jurisdiction. On this evidence the denial of petitioner's federal right to due process by the state court is plain, irrespective of whether it be concealed under an unsupported general assumption as to the child's present welfare or "economic security", petitioner's alleged lack of "superiority of character", his alleged "delay" in waiting to establish these substantial changes of circumstances until after they had actually occurred, or a claimed lack of authority to review a clear abuse of "discretion" by the trial court (cf. *contra, Dye* v. *Lalor*, 94 Vt. 103, 116; *Schlitz* v. *Lowell Mut. F. Ins. Co.*, 96 Vt. 337, 342; *Temple* v. *Atwood*, 99 Vt. 434, 435).[5] But the assertion of federal rights "is not to be defeated under the name of local practice" (*Davis* v. *Weschler*, 263 U. S. 22, 24; *Barsky* v. *Board of Regents, supra*, 347 U. S. 442, 469-70; *Staub* v. *City of Baxley, supra*, 355 U. S. 313, 319). If more proof was desired on any of these matters, so important to the infant's welfare, a remand was specifically requested "to prevent a failure of justice" (*Brown* v. *Maryland Casualty Co., supra*, 111 Vt. 30, 37; *Shea* v. *Pilette*, 108 Vt. 446, 455) however this too was summarily refused (31). Although now expressing doubts as to petitioner's "economic security" the state court flatly declined a remand to satisfy

[5] "If discretion was exercised on grounds, or for reasons, clearly untenable, or to an extent clearly unreasonable, there was an abuse" (*Dye* v. *Lalor, supra*).

them "to prevent a failure of justice" (cf. *Saunders* v. *Shaw, supra,* 244 U. S. 317, 319).

"It is the essence of all law that when facts are the same the result is the same" (*Hubbard* v. *Hubbard,* 77 Vt. 73, 77). Petitioner was entitled to the equal protection of the laws. Yet exactly the opposite result was reached here when the opinion below is compared with the contemporary decision of the same court (by the same justice) in *Raymond* v. *Raymond, supra,* 120 Vt. 87. Before this conflict[6] was reported the state court concluded the instant case *might* well have gone in petitioner's favor had it heard the evidence in the first instance (citing *Temple* v. *Atwood, supra,* 99 Vt. 434, 435); that there *was* evidence upholding petitioner's contentions; that such evidence *did* "indicate" respondent's adultery and that Kelley "broke up" petitioner's home (23). But when the conflict with *Raymond* was urged as a ground for reargument the state court then emphasized that there was no actual finding of adultery here, that petitioner's "delay" *supra,* justified the disregard of his evidence and that the child's "economic security" now lay with the respondent (26), despite her established reverses and moral unfitness.

Petitioner was entitled to a judicial judgment on the facts and law (*United Gas Co.* v. *Texas,* 303 U. S. 133, 139). Vermont's control over her court proceedings is subject to the qualification that such procedure must not work a denial of fundamental rights or conflict with specific and applicable provisions of the Federal Constitution (*Twining* v. *New Jersey,* 291 U. S. 78, 101; *West* v. *Louisiana,* 194 U. S. 258, 263). "For history proved that judges too were

[6] The conflict between the two decisions was set forth in detail in the reargument motion as soon as its existence became known.

sometimes tyrants'' (*Poulos* v. *New Hampshire,* 345 U. S. 395, 426). This court consequently is not bound by state court findings but may determine for itself the facts upon which the asserted federal right depends (*So. Pac. Co.* v. *Arizona,* 325 U. S. 761, 771; *Hooven & Allison Co.* v. *Evatt,* 324 U. S. 652, 659 and cases cited). Here there was no evidence that the child's ''economic'' or other welfare lay with respondent—indeed all the undisputed proof was precisely to the contrary. Respondent's refusal to appear and produce evidence was but an admission of the want of merit in her defense (*Hammond Packing Co.* v. *Arkansas, supra,* 212 U. S. 322, 331). The Vermont court's action in formulating and enforcing a contrary substantive rule of law has resulted in a denial of due process to this petitioner, even though there was procedural due process (*Shelley* v. *Kramer,* 334 U. S. 1, 17).

No considerations of Vermont local law or public policy can impair the full force and effect required to be given to the Connecticut judgment (*Magnolia Petroleum Co.* v. *Hunt,* 320 U. S. 430, 438-9) and it is immaterial, in that connection, that the judgment was entered on a default (*Morris* v. *Jones,* 329 U. S. 545). On the contrary, it is significant that Kelley, like respondent, although represented by counsel, chose not to defend in Connecticut. If there is to be a full faith and credit clause it follows that a father who has been adjudged an unfit custodian for his own three children in Connecticut cannot thereafter be adjudged in Vermont to be a desirable stepfather and custodian of another's child, to the exclusion of that child's own father and natural guardian who, in this instance, is this petitioner and without blame. Certiorari should be granted to resolve this important problem (*Halvey* v. *Hal-*

vey, supra, 330 U. S. 610, 612, 617; cf. *Adam* v. *Saenger,* 303 U. S. 59, 64).

These federal questions have been properly raised (*Lispena* v. *California, supra,* 314 U. S. 219, 221; *Great Northern Ry.* v. *Sunburst Co.,* 287 U. S. 349, 366-7; *American Surety Co.* v. *Baldwin,* 287 U. S. 156, 164; *Brinkerhoff-Faris Tr. & Sav. Co.* v. *Hill,* 281 U. S. 673, 678; *Saunders* v. *Shaw, supra,* 244 U. S. 317, 320). This court is justified in searching this record to determine whether the crucial finding by the state court that respondent is a fit custodian has a reasonable basis in the evidence (*Plumbers Union* v. *Graham,* 345 U. S. 192, 197).

Conclusion

For the reasons above stated it is respectfully requested that this Petition for a Writ of Certiorari should be granted.

March 31, 1958.

ALBERT G. AVERY,
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New York 5, N. Y.,
Counsel for Petitioner.

Final Judgment of Vermont Supreme Court

State of Vermont,
Washington County. } ss.:

Pleas, Before the Honorable the Supreme Court, at a General Term thereof, begun and held for the County of Rutlant, at Montpelier, in the County of Washington, on the first Tuesday of September, being the 3rd day of said month, in the year of our Lord one thousand nine hundred and fifty-seven:

Present: The Hon. Olin M. Jeffords,
Chief Justice.

The Hon. Walter H. Cleary,
The Hon. Charles B. Adams,
The Hon. Benjamin N. Hulburd,
The Hon. James S. Holden,
Associate Justices.

Officers of the Court,
Norman E. Peduzzi, Clerk of the General Term.
George N. Harman, Clerk of the Supreme Court for the County of Rutland.

On which day said Court was opened and continued its session from day to day for the disposition of causes, until the 12th day of September, A. D. 1957, at 11:10 A. M., when the same was adjourned without day.

Attest: NORMAN E. PEDUZZI,
Clerk.

STATE OF VERMONT
Supreme Court, Rutland County

September Term, 1957.

NORTON D. MCKINNEY,

v.

GEORGIA H. MCKINNEY (KELLEY).

Docket No. 1085

BE IT REMEMBERED, that at a General Term thereof of said Supreme Court begun and held at Montpelier on the 5th day of September, A. D. 1957, Norton D. McKinney, petitioner, then of Middletown Springs, in the County of Rutland, comes by his attorneys, Lawrence C. Jones and Albert G. Avery, and brings his petition on appeal from the Rutland County Court, the same being a proceeding under Section 3252 of the Vermont Statutes, Revision of 1947, to vary the custody of one infant, Kirk McKinney, to the petitionee, on the ground of changed circumstances, to which order and decree in the said County Court of Rutland County the petitioner seasonably took and was allowed his exceptions to this Court.

And at Montpelier in the County of Washington on said 5th day of September, the petitioner being fully heard on the libellant's exceptions, *ex parte;* and because the justices of this court will advise themselves upon the premises before they give judgment thereon, a day thereof is given until the next stated General Term of this court, begun and held at Montpelier aforesaid on the first Tuesday of November, 1957, being the 5th day of said month.

And now at the term of this court, last aforesaid, at Montpelier, again comes the petitioner, Norton D. McKinney, by his said respective attorneys.

WHEREUPON, it is CONSIDERED AND ADJUDGED BY THE COURT that the judgment of the county court is affirmed.

And on November 18, 1957, in accordance with the provisions of the rules of this court, and before certification thereof, the petitioner seasonably filed his motion for re-argument in said cause, and on December 20, 1957, his supplement to the said motion for re-argument, the same being heard, *ex parte,* at the next stated General Term of this court, begun and held at Montpelier, aforesaid, on the first Tuesday, 1958, to wit, January 7.

And at the next stated General Term of this Court, begun and held at Montpelier on the first Wednesday of March, 1958, to wit, March 5, it is CONSIDERED AND ADJUDGED BY THE COURT, that the motion for re-argument is denied, let the full entry go down.

And before certification of the final judgment of the said Vermont Supreme Court of March 5, 1958, the petitioner seasonably filed his motion on March 14, 1958 for a stay of the mandate in said cause, which motion was by the court granted and certification of said final judgment of March 5th stayed.

Done by order of said court at the City of Montpelier, in the County of Washington, this 20th day of March, A. D. 1958.

NORMAN E. PEDUZZI,
Clerk.

SUPREME COURT.

State of Vermont, }
Washington County. } ss.:

I, NORMAN E. PEDUZZI, Clerk of the General Term of the Vermont Supreme Court do hereby certify that the annexed and foregoing is a true copy of the original placita for the September Term, A. D. 1957 of the Supreme Court, and of the record of judgment of the March Term, A. D. 1958 of the Supreme Court, in the cause therein entitled, and of the whole of the same.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Montpelier, in the County of Washington, this 20th day of March, A. D. 1958.

NORMAN E. PEDUZZI,
Clerk.

(SEAL)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 898

NORTON D. McKINNEY,

Petitioner,

vs.

GEORGIA H. McKINNEY KELLEY,

Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VERMONT PURSUANT TO RULE 23,1 (i)

ALBERT G. AVERY,
70 Pine Street,
New York 5, N. Y.,
Counsel for Petitioner.

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

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Decision of Rutland County Court

State of Vermont, }
Rutland County. } ss.:

NORTON D. McKINNEY,
vs.
GEORGIA H. McKINNEY KELLEY.

Docket No. 16891.
Rutland County Court
March Term 1957

FINDINGS OF FACT

The above entitled matter came on for hearing before the Court the 18th day of June, 1957, P. L. Shangraw presiding, on the petition filed in said cause by the Libellant, Norton D. McKinney, seeking a modification of the final order and decree made in said cause under date of February 3, 1953 wherein the original Libellee, Georgia H. McKinney, now Georgia H. McKinney Kelley, was awarded the care, custody and control of the minor child, Kirk McKinney. In these proceedings the said Libellant now seeks the care, custody and control of said minor child, Kirk McKinney.

Service of said petition was made on the Libellee pursuant to an order for service outside the state issued by George H. Harman, Clerk of the Rutland County Court. Said Libellee did not appear at the hearing.

Decision of Rutland County Court.

The Libellant appeared personally and was represented by counsel, Lawrence C. Jones, Esq. of Rutland and Albert G. Avery, Esq. of New York City.

Upon consideration of the evidence, exhibits, and the files and records in said cause the Court finds the following facts:

1. The Libellant, Norton D. McKinney, and the Libellee, Georgia H. McKinney, were united in marriage in New York City on July 12, 1940. Two children were born of the marriage, Norman Denman McKinney, Jr., born January 31, 1942, and Kirk McKinney, born October 27, 1944.

2. Prior to World War II the Libellant, now 46 years of age, was engaged in the construction business in New York and during the war he was Chief Inspector for an armament concern. During June, 1945, he moved his family to Middletown Springs, Rutland County, Vermont acquiring a large home with approximately four acres of land (Photograph Pl. Ex. 2). With his wife as a partner he engaged in the business of raising small animals for sale to laboratories and hospitals in New York City for research purposes.

3. During the period from June, 1945 to about September of the year 1950 the Libellant and the Libellee continued to live in Middletown Springs, Vermont with the two minor children and as partners conducted the above business of raising animals for research purposes. Mrs. McKinney was actively engaged in the business, keeping the business records, handling the correspondence, weighing and typing the animals and generally assisting in said business.

4. The Libellant, on inquiry made by the Court, testified and we so find that the Libellee had received a college education, had traveled extensively and was a very cultured person. Mr. McKinney testified and we so find that while the Libellee was not particularly interested in menial housework, however the Libellant, in substance, testified and we so find that he had "no serious grievance" about anything and, further, that the Libellee was "a nice wife". To this point the Libellant appeared satisfied with his wife and the manner in which she attended to the two minor children.

5. During the month of September or October of the year 1950 Kay Francis Kelley, an employee of the Libellant and the Libellee, made a business trip with the Libellee to New York and had occasion to stay overnight in a New York state motel. Whether or not said parties occupied the same or separate rooms does not appear in evidence. Upon their return to Middletown Springs the following day the Libellant accused the Libellee of infidelity and the Libellee's reply to said accusation was that "nothing happened at all". This appears to be the only incident. This particular incident appears to have lead to the separation of the Libellant and the Libellee during the month of November, 1950, at which time said Libellee left said Libellant and went to New York City, stayed about a month returning to Middletown Springs for about a week after which she returned to New York. The parties did not live together as husband and wife during said week. Kirk remained with his father for about two weeks and on the request of his mother the son, Kirk, was sent to New York by his father via plane. During April, 1951 the son, Kirk,

with his mother went to Detroit, Michigan and the boy was left with his maternal grandmother, a Mrs. Hyde, until about September of the same year.

6. During September of the year 1951 the Libellee removed to 6 Hubbard Street, Glastonbury, Connecticut with her son and entered the employ of the J. B. Williams Soap Company in Glastonbury.

7. On January 17, 1952 the Libellant, Norton D. McKinney, filed in the Rutland County Court a libel for divorce. On April 9, 1952 said Libellant filed in said Court a petition requesting the temporary custody of Kirk McKinney who was residing with the Libellee at Gastonbury, Connecticut. The minor child, Norton Denman McKinney, Jr., was residing with the Libellant at Middletown Springs. As set forth in said petition of said Libellant "the custody of the children as above set forth was, more or less, voluntary on the part of the Libellant and the Libellee". Under date of April 21, 1952 the Libellee likewise filed a petition seeking the custody of the two minor children, Kirk and Denman. Hearing was held on said petition April 24, 1952 and under the same date an order was made wherein the Libellee was awarded the care and custody of the son, Kirk McKinney, and the Libellant was awarded the temporary custody of the minor child, Norton Denman McKinney, Jr.

8. Libellant's petition for divorce was heard by the Rutland County Court on February 3, 1953 and on said date said Libellant was granted a divorce from the bonds of matrimony on the grounds of intolerable severity, decree *nisi* to become absolute on March 3, 1953. The said Libellee

was forbidden to marry any person other than the Libellant within a period of thirty days or until March 3, 1953, at which time the divorce became absolute and the period of prohibition ended for the Libellee. The care, custody and control of the minor child, Norton D. McKinney, Jr., was awarded to the Libellant. The care, custody and control of the minor child, Kirk McKinney, was awarded to the Libellee with the right on the part of the Libellant to see and visit said child at any and all reasonable times and places provided the order as to support money, namely $10.00 per week, had been complied with. Libellant has complied with said order. Said decree also contained a provision wherein the Libellant was ordered to execute unto the Libellee a second mortgage on the premises of the Libellant in Middletown Springs to secure unto the Libellee payment of $2,500.00 which was subsequently modified by order dated January 28, 1954 wherein said provision was stricken from the original order and the Libellant ordered to pay the Libellee $2,250.00 forthwith and that by quit claim deed the Libellee release unto the Libellant any and all right, title and interest which she then had or might have unto the homestead located in Middletown Springs, Vermont. In answer to a question propounded by the Court the Libellant testified that at the time hearing was had on Libellant's petition for divorce I assented to my wife's having Kirk. This we find to be a fact.

9. Libellant's divorce petition was served on the Libellee in the Town of Glastonbury, County of Hartford, Connecticut, on January 23, 1952, by Albert J. Dusault, a deputy sheriff. Mr. Dusault was accompanied by Daniel

Decision of Rutland County Court.

A. O'Connor, a private investigator. Service of the petition was made on the Libellee shortly after midnight at her apartment. Kay Francis Kelley was present in the kitchen. The Libellee was wearing a housecoat. Francis Kelley was partially disrobed, wearing a T-shirt and other clothing.

10. During January of the year 1952 Mr. O'Connor, then in the employ of the Libellant, had occasion to check on the whereabouts of Mr. Kelley and ascertained that he was a nightly visitor at the Libellee's Glastonbury apartment, arriving on occasion after midnight and departing between three and four o'clock in the morning. Mr. Kelley resided a distance of about 600 ft. from the apartment occupied by Mrs. McKinney, the Libellee.

11. During July of 1953 the Libellant visited the Libellee and Kirk in Connecticut, taking them out to dinner in a public restaurant. Further, during August of the year 1953 the Libellee with the son, Kirk, visited the Libellant and the boy, Denman, at Middletown Springs.

12. The Libellee was first employed by the J. B. Williams Soap Company in Glastonbury, Connecticut, later in an architect's office in Hartford, Connecticut, and is now presently employed by a Coca Cola Bottling plant in East Hartford, earning between $50.00 and $55.00 a week.

13. On November 8, 1955 Mr. Kelley filed a suit in the Superior Court for Hartford County, Connecticut against his wife, Laura, for a divorce on the alleged grounds of desertion. On December 7, 1955 Mrs. Laura Kelley filed a cross-complaint alleging Mr. Kelley's desertion of her and their three minor children on June 28, 1952. Mr. Kelley's

complaint was withdrawn on May 1, 1956 and on Mrs. Kelley's cross-complaint said Superior Court made and entered its final decree granting Laura Kelley an uncontested divorce on the grounds of Mr. Kelley's desertion as alleged awarding her the custody of the three infant children and directing Mr. Kelley to pay a total of $27.00 weekly for their support (Lbt.'s Ex. 3).

14. On September 21, 1956 the Libellee and Mr. Kelley were married at East Hartford, Connecticut (Lbt.'s Ex. 1) and in November, 1956 they removed with Kirk to Andover Lake, Connecticut where Mr. Kelley acquired a four-room one and a half story bungalow.

Photograph Lbt.'s Ex. 4 represents the home occupied by the Libellee while residing in Hartford, Connecticut.

Photographs Lbt.'s Exs. 8 and 9 represent the residence of the Libellee at the time of the service of Libellant's divorce petition.

Photograph Lbt.'s Ex. 5 represents Mr. Kelley's three minor children.

Photograph Lbt.'s Ex. 6 represents a photograph of Kirk McKinney and on the reverse side the photograph of Denman McKinney.

Sketch Lbt.'s Ex. 7 represents a rough sketch of the residence in Andover, Connecticut now occupied by the Libellee and her present husband, Mr. Kelley. Said Andover Lake is a small lake or pond and is located approximately twenty-eight miles from Hartford, Connecticut where both the Libellee and Mr. Kelley are presently employed. The nearest settlement is Andover, about four

miles distant, with a population of about three hundred persons. There is a central school, attended by Kirk, a distance of one mile from the Kelley house. The Libellee and Mr. Kelley during working hours leave Kirk, more or less, unattended except while in school.

15. Kirk is the favorite son of the Libellee and refers to Mr. Kelley as his father. Kirk, at least on one occasion, has referred to his brother, Denman, who is employed on a farm, as a "dummy".

16. The Libellant complains that he has been unable to visit Kirk during the last three years. However, no competent evidence worthy of belief was introduced indicating any sincere effort on his part to see the boy.

17. Thomas J. Flanders, a private investigator, employed by the Libellant, called at the Kelley home during the year 1957 and interviewed the boy who referred to Mr. Kelley as his father. Mr. Flanders testified and we so find that Kirk is an intelligent boy, apparently resented the presence of Mr. Flanders, inquired of his business and suggested that he Flanders "get out of here".

18. Mr. Kelley averages to work forty hours per week at an hourly rate of $2.37 per hour.

19. The home owned by Mr. Kelley, the above mentioned one and a half story bungalow purchased by Mr. Kelley at Andover Lake, is valued at between $6,000.00 and $7,000.00.

20. Kirk appears to be contented in his present home, is attending school and is apparently fond of his stepfather, Mr. Kelley. No competent evidence was introduced to the contrary nor did the Libellant introduce any evi-

dence indicating that the present home of Kirk is not conducive to his welfare. Since the parties separated in the fall of 1950 the Libellee has had, more or less, constant control and custody of the boy, Kirk.

21. Mr. McKinney resides at Middletown Springs, Vermont and as present members of his household there are his uncle, Dr. Norton D. Fletcher, age 80, his aunt, Mrs. Reid, age 81, a housekeeper, Mrs. Lincoln, age 40, and the son Denman. The doctor who was improved as a witness testified that he is retired, of financial means and will assist in the care and education of Kirk. This, of course, is a pure naked promise without any assurance or financial guarantee unto Kirk.

22. The Libellant, Norton D. McKinney, at least for the present is dependent upon the good graces of Dr. Fletcher, his present employment being limited to general charge of the homestead in Middletown Springs and assistance rendered unto Dr. Fletcher as a companion and business advisor or assistant. The extent as well as the limit of the doctor's financial circumstances is unknown to this Court, no evidence thereon having been introduced. No evidence was introduced by the Libellant as to his financial circumstances nor his present earnings or earning capacity. It is apparent to this Court and we so find that no competent or sufficient evidence has been introduced which would lead us to the conclusion that a change or modification of the custodial order, to which the present petition is addressed, would in any way be conducive to the best interest and welfare of Kirk. While the Libellee's conduct since her separation from the Libellant may have been somewhat unconventional her competence as a mother has not been chal-

lenged and we find that Kirk is happy, contented and well cared for in his present home and, having in mind his general welfare, ought not to be disturbed.

The petition should be dismissed.

All the exhibits and the records and files in this cause are referred to and made a part of these findings and the transcript of the evidence, if furnished, is made a part of these findings, all for the purpose of testing whether the findings are warranted by the evidence.

Dated at Rutland, in the County of Rutland and State of Vermont this 17th day of July, 1957.

/s/ P. L. SHANGRAW
/s/ ELMER R. PRESTON
/s/ E. T. WILLIAMS
Judges, Rutland County Court

Opinion of Vermont Supreme Court

No. 1085

SUPREME COURT
RUTLAND COUNTY

SEPTEMBER TERM 1957

NORTON D. McKINNEY,

v.

GEORGIA H. McKINNEY KELLEY.

Present: JEFFORDS, C. J., CLEARY, ADAMS, HULBURD and HOLDEN, JJ.

HULBURD, J. The petitioner seeks under V. S. 47, § 3252 to have a custody order modified. The petition was served upon the petitionee in Connecticut, following which she notified the court that she did not care to appear. Accordingly, the case was heard below as an uncontested matter. After hearing the petitioner's evidence, the trial court refused to modify the custody order and dismissed the petition. The case comes here on the petitioner's exceptions to the action of the county court.

Extensive findings were made by the court below. To some of these the petitioner excepted. He also saved many exceptions to the court's refusal to find certain facts as requested. We will briefly summarize those facts found which stand unchallenged by any exception briefed by the petitioner. On July 12, 1940, the petitionee and petitioner were married. The parties had two children: Denman, born January 31, 1942, and Kirk, born Oct. 27, 1944. During June of 1945, the McKinneys came to Middletown Springs, Vermont to live. Here Mr. McKinney, with his wife as partner, engaged in the business of raising animals for sale to laboratories for research purposes. In carrying

on this enterprise, the McKinneys needed further help and they employed Kay Francis Kelley to assist them. Some time thereafter an incident occurred concerning which the petitioner introduced evidence resulting in the following finding by the court:

> "5. During the month of September or October of the year 1950 Kay Francis Kelley, an employee of the Libellant and the Libellee, made a business trip with the Libellee to New York and had occasion to stay overnight in a New York state motel. Whether or not said parties occupied the same or separate rooms does not appear in evidence. Upon their return to Middletown Springs the following day the Libellant accused the Libellee of infidelity and the Libellee's reply to said accusation was that 'nothing happened at all'. * * * This particular incident appears to have led to the separation of the Libellant and the Libellee during the month of November, 1950, at which time said Libellee left said Libellant and went to New York City, stayed about a month returning to Middletown Springs for about a week after which she returned to New York.—"

On January 17, 1952, in Rutland County Court the petitioner filed his libel for divorce charging adultery. Thereafter the adultery charge was withdrawn and on February 3, 1953, the petitioner was granted a divorce from the petitionee on the ground of intolerable severity. Custody of the two children was decreed by the court in accordance with a stipulation of the parties. Under it, Denman went to the father, and Kirk, to the mother. Kirk has remained with his mother in Connecticut ever since, and it is as to him that the petitioner seeks a change in custody.

On September 21, 1956, the petitionee remarried. It was the second marriage also for her new husband. He was Kay Francis Kelley, the McKinneys' former employee.

Kelley's first marriage had terminated in a divorce. He had instituted divorce proceedings on November 8, 1955. His wife had filed a cross-complaint, charging desertion; whereupon Kelley withdrew his complaint and a divorce was granted the wife uncontested by Mr. Kelley. Mrs. Kelley was awarded the custody of three infant children and Kelley was directed to pay the sum of $27.00 weekly for their support.

After Kelley and the petitionee were married in 1956, they went to live in Andover, Connecticut, in a home purchased by Mr. Kelley. Kirk had continued with his mother ever since she had separated from her husband in 1950 and went on doing so in the new home. He has come to refer to Mr. Kelley as "father". Both Mr. and Mrs. Kelley are employed; she for a Coca Cola Bottling Company at about $50.00 a week, while he averages to work forty hours per week at an hourly rate of $2.37 per hour.

It is largely in the light of the finding No. 5 which we have quoted that the petitioner claims that the subsequent marriage by the petitionee to Kelley (some six years later) furnishes a compelling reason for changing the custody of Kirk from his mother to the petitioner. Such a result the petitioner claims is further supported by additional facts which he requested the court to find.

Before turning to these requests it might be well to review certain legal principles which are applicable to a problem of this sort.

At the outset it is well settled that in order to warrant the modification of a custody order, a change in conditions or circumstances must be shown. *Buckminster v. Buckminster,* 38 Vt. 248, 250; *Sand v. Sand,* 116 Vt. 70, 71, 6 A.

2d 32. It is equally well settled that it is the welfare of the child which in the last analysis is determinative in a custody matter. *In re Cooke,* 114 Vt. 177, 183, 41 A. 2d 177; *Deyette v. Deyette,* 92 Vt. 305, 309, 104 A. 232. Bringing the foregoing principles together, it should be apparent that "change of circumstance" is not a "ground" for modification of a custody decree. It is a prerequisite. In other words, to justify the modification of a custody order the petitioner must first show that there has been a change of circumstances, and then go on to show that under the new conditions a change of custody would be for the best interests of the child. Fortunately, in this world not all changes in condition are for the worse; some are for the better, and when a child is thus favored, obviously he should not be unsettled. It is for the trial court to determine whether a change of custody is desirable under the altered circumstances. This determination often involves a balancing of the advantages and disadvantages which will result in granting custody to one or the other of two parents. *Raymond v. Raymond,* 120 Vt. 87, ____, 132 A. 2d 427, 431. Thus it becomes a question of judgment and sound discretion, and if the county court does not abuse its discretion in the determination, there is nothing for this court to review. 27 C. J. S. p. 1263; *Miller v. Miller,* 89 Vt. 547, 548, 95 A. 928.

Against the background of these legal principles, what are we confronted with here? The petitioner points to the fact that the petitionee has remarried, and this he says furnishes the required change of circumstances. Moreover, he asserts, not only has the petitionee remarried, but that marriage was to the very man with whom the petitionee was carrying on an adulterous relationship while she was still the wife of the petitioner. The findings of the court

below do not support this position. No adultery has been found. It is clear that the court was not satisfied that adultery had been committed, even though there was evidence tending to indicate to the contrary. The most that can be claimed for the findings is that the court found that the petitionee, while married to the petitioner, became infatuated with Kelley around 1950, that the petitioner became aware of this infatuation, that it led to trouble between the petitioner and petitionee and a divorce in 1953 and that in 1956 the infatuation culminated in a marriage between the petitionee and Kelley. Although refusing to find that the prior relationship of Kelley and the petitionee was illicit, it did find it to be "unconventional".

In these circumstances did the court below, in refusing to modify the custody order, abuse its discretion? This is a question which we will discuss a little later in the opinion.

Before reaching it, we must first consider the petitioner's requests to find, for the petitioner claims that if the court had properly found all that he requested, his case would have been greatly strengthened and a different ultimate decision would have been dictated.

The requests are twenty-four in number. Almost all are unfortunately long, often containing numerous sentences and several subject matters. The petitioner has proceeded on the theory that every piece of evidence however trifling should be solidified into a finding. He has worked with a very fine brush, indeed. This is not the purpose of findings of fact. The law does not contemplate that the trial court should re-state the evidence nor report all the subordinate facts. *Partridge v. Cole,* 98 Vt. 373, 375, 127 A. 633. Moreover, when a request is multiple in character,

there is always the risk that some valid element of it may become embedded in other elements which the requesting party is not entitled to have found. As a result the good falls with the bad, for the whole must be supported by the evidence and not merely a part. See 89 C. J. S. § 619 at page 441. Most of the petitioner's requests are of this character. This includes Nos. 2, 3, 4, 5, 6, 8, 9, 10, 11, 13, 13, (there are two "13's") 14, 15, 16, 17, 18, 19, 20, 21, 22, 23. Their number and length do not permit us to quote them individually. The remainder have not been briefed and so are waived. After a careful examination of each we find no error in refusing to find as requested. It was for the trial court to interpret and evaluate the evidence and present its resultant findings on the essential elements of the case. There has been no error or omission in this respect.

In addition to taking exceptions to the court's refusal to find, the petitioner has excepted to certain findings as made. The first of these is to the statement of the court in Finding 4 that petitioner "appeared satisfied with his wife and the manner in which she attended to the two minor children"; also in Finding 5 the court stated "this appears to be the only incident"; and further in Finding 20 the court stated that Kirk "is apparently fond of his stepfather, Mr. Kelley." We agree that such statements are not to be treated as proper findings of fact (see *Avery v. Bender*, 119 Vt. 313, 331, 126 A. 2d 99,) and should be disregarded. However, they furnish nothing indispensable to the overall position taken by the court below and so do not constitute reversible error. We should guard against assuming that rejection of these statements as findings, however, is equivalent to a finding to the opposite

effect. Thus, the court's statement that "Kirk appears to be contended", when disregarded, is no finding at all that he is discontented. If that is the fact, the petitioner has failed to establish it.

The trial court found that the petitionee was college-educated, had traveled extensively, and was a very cultured person. The petitioner excepted to so much of the findings as finds the petitionee "a very cultured person" as being "without relevancy in determining her fitness as a custodian in 1957." No error appears. Having introduced evidence concerning the petitionee's actions before the divorce tending to show her character and possible shortcomings, the petitioner can not properly ask the court to disregard as immaterial all evidence tending to show her desirable qualities and fitness as a mother. Compare *Sullivan v. Sullivan,* 141 Conn. 235, 104 A. 2d 899, 901.

The same thing applies to an exception to the court's finding: "Mr. McKinney testified and we so find that while the Libellee was not particularly interested in menial housework, however the Libellant, in substance, testified and we so find that he had 'no serious grievance' about anything and, further, that the Libellee was 'a nice wife'. To this point the Libellant appeared satisfied with his wife and the manner in which she attended to the two minor children."

The petitioner excepted to finding 6 where the court found that petitionee moved to Glastonbury, Connecticut, with her son in September 1951. A reading of the transcript shows that the petitioner was never very clear as to dates in his testimony. It may be that the boy, who

had been with his maternal grandmother in Detroit, did not come to his mother until the following January. If there is an error on the matter of dates, it is a trifling one and no basis for upsetting the action of the lower court. *Shaw v. Shaw,* 99 Vt. 356, 358, 133 A. 248.

Petitioner excepted to the trial court's finding (16) that "no competent evidence worthy of belief was introduced indicating any sincere effort on his (petitioner's) part to see the boy" in the last three years. There was evidence that at some time—the transcript does not make clear when—the petitioner wrote to the petitionee proposing that he bring Denman down to see his brother. The petitionee wrote back that the proposed visit would not be convenient. There is no evidence that the petitioner ever made any effort to try another date to see if it would be more convenient. We think this was a matter for the trial court to evaluate on the evidence and we can not say that its finding was unwarranted nor that a complete denial of visitation rights was established as claimed by the petitioner.

The petitioner excepted to findings 20, 21, 22 on the ground that they were erroneous conclusions of law and that the "second portion" of finding 20 is contrary to the evidence. These three findings read as follows:

> "20. Kirk appears to be contented in his present home, is attending school and is apparently fond of his stepfather, Mr. Kelley. No competent evidence was introduced to the contrary nor did the Libellant introduce any evidence indicating that the present home of Kirk is not conducive to his welfare. Since the parties separated in the fall of 1950 the Libellee has had, more or less, constant control and custody of the boy, Kirk.

"21. Mr. McKinney resides at Middletown Springs, Vermont, and as present members of his household there are his uncle, Dr. Norton D. Fletcher, age 80, his aunt, Mrs. Reid, age 81, a housekeeper, Mrs. Lincoln, age 40, and the son, Denman. The doctor who was improved as a witness testified that he is retired, of financial means and will assist in the care and education of Kirk. This, of course, is a pure naked promise without any assurance or financial guarantee unto Kirk.

"22. The Libellant, Norton D. McKinney, at least for the present, is dependent upon the good graces of Dr. Fletcher, his present employment being limited to general charge of the homestead in Middletown Springs and assistance rendered unto Dr. Fletcher as a companion and business advisor or assistant. The extent as well as the limit of the doctor's financial circumstances is unknown to this Court, no evidence thereon having been introduced. No evidence was introduced by the Libellant as to his financial circumstances nor his present earnings or earning capacity. It is apparent to this Court and we so find that no competent or sufficient evidence has been introduced which would lead us to the conclusion that a change or modification of the custodial order, to which the present petition is addressed, would in any way be conducive to the best interest and welfare of Kirk. While the Libellee's conduct since her separation from the Libellant may have been somewhat unconventional her competence as a mother has not been challenged and we find that Kirk is happy, contented and well cared for in his present home and, having in mind his general welfare, ought not to be disturbed."

In discussing his exceptions to these findings the petitioner devotes most of his briefing to calling our attention to various pieces of evidence which would have supported a different outcome from the one at which the

court arrived. We do not hesitate to say that a considerable part of the evidence was favorable to petitioner's contention, but it is also clear that what the court found in findings 20, 21 and 22, and its ultimate conclusion based thereon, are not without support in the evidence. The court finds that no competent evidence was introduced by the petitioner to show that Kirk was not contented in his present home and fond of his stepfather. In fact, in Finding 17 the court finds that when a private detective or investigator called on Kirk at the Kelley home in 1957, the boy asked the investigator the nature of his business and upon learning it, showed his resentment by telling the investigator "to get out of here." This is a sufficient indication that the boy, himself, has no wish to be taken from the custody of his mother and convincing evidence to the contrary was required if the petitioner wished to establish otherwise.

As to the "erroneous conclusion of law" ascribed to the court in the final sentence of Finding #21, it is enough to say that the mere fact that a finding, or a portion of it, is a conclusion of law is harmless when it is sustained by other facts found which are sufficient in law to support the conclusion. *Schwarz v. Avery*, 113 Vt. 175, 180, 28 A. 2d 637. There is nothing in the conclusion objected to which is inconsistent with the other findings.

The petitioner excepted to Finding #17 wherein the court found that Kelley's present home is a story and a half bungalow valued "at between $6,000.00 and $7,000.00." The testimony was that it was "worth at approximately $6,000.00". Any discrepancy between the court's finding and the evidence is "too trivial or unim-

portant to affect the result" and so unworthy of further consideration. *Shaw v. Shaw,* 99 Vt. 356, 358, 133 A. 248.

The petitioner excepted to the court's finding as to the manner that Kelley was dressed on the night of January 23, 1952, when petitionee was present. The finding is supported by the evidence and so is Finding #7 that the custody of Kirk by the petitionee "was more or less voluntary on the part of the petitioner." This finding is excepted to although the language used by the court is that of the petitioner in his own petition in this matter. No error appears.

Before leaving this group of exceptions, we think we should call attention to a statement in *Miller v. Miller,* 89 Vt. 547, 549, 95 A 928; "A court or jury is not bound in all circumstances to believe testimony not directly contradicted." We think this holding has particular force and application to the hearing had here where only one side was represented, and where there was no one on hand to challenge any particular assertion. Under such circumstances, the trial court has a broad latitude in determining what evidence is worthy of belief and its findings should be read accordingly.

We now return to a consideration of a question left unanswered earlier in the opinion. Having satisfied ourselves that the findings as they stand represent the situation as the court might properly find it to be, we are ready to consider the ultimate question of whether the refusal of the court to modify the custody order was an abuse of discretion in the circumstances as found.

Doubtless the major circumstance is that the petitionee married—about six years later—the man concerning

whom trouble arose during the married life of the petitioner and petitionee. In considering this problem and the petitionee's present circumstances, we must be careful to avoid an assumption of more guilt than has been found. We think it fair to say that Kelly's attentions, whatever they were, broke up the petitioner's home, but to refer to the situation as involving an "adulterous relationship" and "immoral conduct", as the petitioner does, is to get outside the facts as found.

The petitioner has brought to our attention a number of cases bearing on this phase of the matter. The question of custody, to a large extent, must be decided on the circumstances peculiar to the particular situation. It will serve no purpose, therefore, to undertake an analysis of the various cases cited. A note in 43 A. L. R. 2d 264 has collected, and so far as possible, classified the decisions on this subject. It is to be noted that, at times, courts seem to lose sight of the paramount objective, the welfare of the child, and allow it to be obscured by a spirit of retribution.

The court below may well have considered that a parent who knowingly sends his child into conditions which he now says were bad is not one who has displayed such a superiority of character as to suggest that the child's welfare would be safer in his hands. To be sure, the marriage of the petitionee to Kelley represented a change in conditions, but the real question remained: was the change detrimental as far as Kirk's welfare is concerned? The trial court concluded, and we can not say it abused its discretion in so doing, that the change, if anything, represented a change for the better. If conditions, at the

time of the divorce were unstable, they have become stabilized; if they were unconventional, they have become conventionalized. There is no finding, nor evidence, of any irregularity in the petitionee's conduct at the present time. After the crisis had passed and six years had elapsed, the court below came to the conclusion that Kirk "ought not to be disturbed". As was said in *Temple v. Atwood*, 99 Vt. 434, 435, 134 A 591,

> "Regardless of what this Court, or some other court, might have done in the circumstances, the record does not show that the discretion of that court was exercised on grounds, or for reasons, clearly untenable, or to an extent clearly unreasonable, which is the recognized test in this State."

In holding as we do, we have not overlooked certain additional grounds for modification claimed by the petitioner, namely: the present financial position of the petitionee; the petitioner's present situation generally; the so-called alienation of Kirk's affection for his father and brother; the visitation difficulties resulting from Kirk being where he is; the differences in religious belief between the petitionee and her second husband. It is enough to say that the claims in connection with the foregoing were not sustained in fact by the findings of the county court, nor can we say that the findings were unjustified on the evidence before it.

For the reasons stated, the judgment order of the county court is *affirmed*.

Opinion of Vermont Supreme Court on Motion for Reargument

Present: CLEARY, ADAMS, HULBURD, HOLDEN, JJ. and BARNEY, Supr. J.

HULBURD, J. The petitioner has moved for reargument. We can well understand that it is difficult for a father to accept a result unfavorable to him in a matter of this sort, especially where he believes it to be at variance with one of our recent decisions. When this case was first argued, *Raymond v. Raymond*, 120 Vt. 87, 132 A. 2d 427, had not been officially reported and it first came to the petitioner's attention from our citation of it in the foregoing opinion. Having now had a chance to read the *Raymond* opinion, the petitioner is convinced that the present case is in "direct conflict" with it, and his motion for reargument is based on that ground. If being in direct conflict means that in the former case the custody of the minor child was awarded to the father, while in the present case the mother's right of custody was upheld, then the petitioner is right. Because, however, two cases arrived at opposite results, means little until the facts behind them are taken into account. An examination of the basic facts of the two cases, as found by the trial court, completely undermines the petitioner's position. The *Raymond* case was a divorce action brought by the husband on the ground of adultery. It was tried on that ground; the adultery was found, and a divorce was granted because of it. In connection with the proceeding the father sought custody of the minor child. The trial court determined that the child's welfare was best served by his being put in his custody instead of that of the mother. We held that the trial court's determination was amply supported by the evidence.

Opinion of Vermont Supreme Court on Motion for Reargument.

When we turn to the present case, we are confronted with a situation of an entirely different character. Here, the petitioner, when he brought his libel for divorce in January 1952, did charge adultery, but at the trial in February he abandoned this ground and sought a divorce only by reason of intolerable severity. No finding of adultery was made by the court. Moreover, the petitioner abandoned any attempt to have the custody of the minor children awarded to him. Instead, he stipulated that the child here in question might be given to the mother. In confirmation of this petitioner has testified in open court that he consented to this arrangement and it is apparent that he did so with the same knowledge of the then existing conditions which he now has and which he urges as a part of his case in connection with his petition for change of custody. This is a petition which he has not seen fit to bring until some five or more years have elapsed since the origin of his difficulties. Added to all this is the finding of the trial court that the petitioner, Mr. McKinney, "at least for the present is dependent upon the good graces of Dr. Fletcher". We interpret this finding as expressing a doubt as to whether the child's economic security would be benefitted by a change to his father's custody since the finding goes on to say, "no evidence was introduced by the libellant as to his financial circumstances nor his present earnings or earning capacity". Obviously, here was an important factor bearing on the question of custody entirely different from anything in the *Raymond* case. It is because of the infinite variety of facts and factors that questions such as the one involved here have to be left to the discretion of the trial court. True it is that "it is the essence of all law that

when the facts are the same the result is the same." *Hubbard v. Hubbard*, 77 Vt. 73, 77, 58 A. 969. But here there was no identity of facts as trial court's findings show.

In his comparison of the two cases the petitioner seeks to escape this barrier by going behind the facts found—that is, into the evidence. He reviews it in great detail and concludes there was more of it in his favor here and hence a stronger case against the wife than in *Raymond v. Raymond*. The *Raymond* case, he asserts, presented only "one isolated instance from which adultery could be inferred". Here, he argues, the evidence is spread over five instances—and he enumerates them in detail—and yet in spite of his "five-fold" superiority, he complains, no adultery is found and the mother is allowed to retain her child. On this point the *Raymond* case should help the petitioner to understand how it is that the decision went against him. We there pointed out that it was for the trial court to say whether or not it would infer adultery from the evidence before it, be there one instance or more. "Episodes", we said, "like witnesses are to be weighed and not counted." Thus, in no sense can it be said that this case is in conflict with the *Raymond* case. Far from being so, it is entirely loyal to it and the reasoning underlying it. In the *Raymond* case the father came to this court with the findings in his favor with evidence tending to support them; here the findings were against the petitioner. The weight of the evidence was for the trial court and its findings are not for revision here. *Platt, Admx. v. Shields and Conant*, 96 Vt. 257, 271, 119 A. 520, 526.

Under what the petitioner calls point "2", he continues to compare evidence, having moved on to the matter of

housekeeping. On their facts in this regard, he sees an irreconciable conflict between the decision here and in the *Raymond* case. The trial court found that although housework might not appeal to Mrs. McKinney as much as some, there was no serious grievance with respect to it. What the *Raymond* case stands for in this regard is that a mother who leads her children into ways not consistent with their welfare can not hope to hold her children merely because the menial aspects of housekeeping are adequately performed by her. No inconsistency appears; the cases are complementary rather than in opposition.

Petitioner's point "3" concerns the statement in the opinion above that there was an indication that the boy had no wish to be taken from his mother and "convincing evidence to the contrary was required if the petitioner wished to establish otherwise". This statement, the petitioner argues, is "precisely contrary" to the holdi. , of the *Raymond* case wherein we stated that the welfare of the child was paramount and that "to that welfare, the rights, claims and personal desires of the parents, and even the wishes of the child, if opposed to that object, must yield". The trouble with the petitioner's argument is that here by the findings of the trial court the wishes of the child were not opposed to that object. In oral argument the petitioner seemed to assume that by our holding in the *Raymond case*, the wishes of the child are never to be considered. This is not correct. There might be a case where the child's welfare might be equally served by the custody of either parent. If this were so, the child's wishes might well be a determinative factor. If the petitioner thought that this was the situation here, the opportunity was his to make out such

a case as he could, for it is only where the child's wishes are opposed to his own welfare, that such wishes must yield. No conflict with the *Raymond* case appears.

Points "4" and "5" of the petitioner's motion overlap and are somewhat generalized. Their chief focus seems to be on our citation from *Miller v. Miller,* 89 Vt. 547, 549, 95 A. 928, 929, from which we quoted as follows: "A court or jury is not bound *in all circumstances* (emphasis supplied) to believe testimony not directly contradicted." Such a statement the petitioner argues is in conflict with what was later held in *Lapierre v. Halpin,* 111 Vt. 193, 196, 13 A. 2d 281, 282. Actually in *Lapierre v. Halpin, supra,* this Court was careful to distinguish the holding there made from that in the *Miller* case and in doing so approved the holding of the latter. What the petitioner fails to take into consideration is the fact that at the time of his divorce he relinquished the custody of his child to the mother with full knowledge of the existing circumstances and thereafter he allowed some five years to elapse from the time of the origin of his difficulties before seeking custody of his child. The petitioner's entire testimony, although uncontradicted, was to be weighed in the light of this delay. The extent to which one's conduct may discredit one's testimony is a matter for the trial court to determine. It is just at this point that *Miller v. Miller, supra,* becomes important and proper in such a case as this.

The petitioner's misconception, we fear however, reaches greater depths. There is a good deal in his brief to indicate that he regards this matter altogether too much like a default in a collection suit. The mother has not appeared to contest the petitioner's claim. It follows, he

seems to think, that a judgment order should issue in his favor, almost as a matter of course, where his case is not contested. But this is not a mere contest of property rights between two parties. We have a third human being involved here. The welfare of a child is not a matter of default. By reason of this fact it was particularly incumbent on the court to weigh and evaluate the evidence with utmost care. The court's overall conclusion will not be disturbed by us unless the record discloses that the discretion of the trial court was exercised on grounds, or for reasons, clearly untenable, or to an extent clearly unreasonable. *Houran, Admr. v. Ins. Co.*, 109 Vt. 258, 270, 195 A. 253, 258.

By a supplement to his motion for Reargument, the petitioner claims that in applying the rule of *Miller v. Miller, supra,* we have permitted the trial court to arbitrarily disregard uncontradicted evidence and to decide a case "in accordance with its own arbitrary predisposition" and that in doing so this is a plain denial of the right guaranteed the petitioner by the Fourteenth Amendment to the United States Constitution. That there was no such arbitrary disregard of the petitioner's evidence and that this Court by its decision said nothing to authorize that sort of thing may be readily gathered from what we have stated earlier. Clearly this case has been determined under the established decisions of this Court. There is no merit in the petitioner's contention.

The petitioner has asked that this case may be remanded in order to prevent a failure of justice pursuant to *Shea v. Pilette*, 108 Vt. 446, 455, 189 A. 154, 158. The petitioner has not specified any particular reason why this should be

done. We know of none and hence have no basis for taking such action.

We have now considered all of the grounds of the petitioner's motion and have discovered no reason for reargument. We have dealt at length with each of his contentions to the end that we might help him to understand what actually enters into this Court's disposition of the matter. Our hope in this regard, however, is somewhat restrained. In primarily basing his motion for reargument on a comparison of evidence in two cases, the petitioner has disclosed a basic misconception in his approach to the whole problem. We are dealing here with the findings of a trial court and its exercise of discretion. We can not substitute ourselves for the lower court; the weight of the evidence is not for us to pass upon, nor can we overturn the action of the trial court unless, as we have stated, the discretion of that court was exercised on grounds, or for reasons, clearly untenable, or to an extent clearly unreasonable. This is all made manifest by the cases we have cited. In both this and the *Raymond* case we affirmed because no such abuse of discretion was shown.

We might have disposed of the petitioner's motion in the apt and tense language of *Colby's Executor v. Poor*, 115 Vt. 147, 154, 55 A. 2d 609, but we have made the more extended endeavor in an earnest attempt, by further exposition, to make all clear and plain.

Motion for Reargument denied. Let full entry go down.

CONSTITUTION AND STATUTES INVOLVED.

Article IV of the Constitution of the United States:

"Section 1. Full Faith and Credit shall be given in each State to the public Acts, Records and Judicial Proceedings of every other State. And the Congress may be general laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved and the effect thereof."

Fourteenth Amendment to the Constitution of the United States:

"Section 1. * * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

28 U. S. Code Section 1257 (3) (62 Stat. 929):

"Final judgments or decrees rendered by the highest court of a State in which a decision could be had may be reviewed by the Supreme Court as follows: * * * (3) By writ of certiorari * * * where any title, right, privilege or immunity is specially set up and claimed under the Constitution, treaties or statutes of, * * * the United States."

28 U. S. Code Section 1738 (62 Stat. 947):

"* * * The records and judicial proceedings of any court of any such State, * * * or copies thereof, shall be proved or admitted in other courts of the United States * * * by the attestation of the clerk and seal of the court annexed if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such * * * records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States * * * as they have by law or usage in the courts of such State * * * from which they are taken."

Constitution and Statutes Involved.

Connecticut General Statutes (1949 rev.):

"*Sec. 8545. Adultery.* Any man and any married woman who shall commit adultery with each other shall be imprisoned not more than five years."

"*Sec. 8553. Fornication or lascivious carriage.* Any person who shall be guilty of fornication or lascivious carriage or behavior shall be fined not more than one hundred dollars or imprisoned not more than six months or both."

Vermont Statutes (1947 rev.):

"3252. *Orders as to care of Minor Children.* When a marriage is annuled or a divorce granted, and at any time thereafter, upon petition of either of the parents, the court may make such other and further decree as it deems expedient concerning the care, custody and maintenance of the minor child and on the petition of either of the parents may annul, vary or modify such order."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 898

NORTON D. McKINNEY,

Petitioner,

vs.

GEORGIA H. McKINNEY KELLEY,

Respondent.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VERMONT

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SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VERMONT

Petitioner respectfully submits this supplemental brief, at the suggestion of the Clerk, solely for the purpose of inviting the attention of this Court to certain important facts and circumstances in aid of his petition for a writ of certiorari which now appear in the record of this cause herein but which were not disclosed until after the docketing of this cause on April 4, 1958.

I.

As appears from the certiorari petition (pp. 2-3) the major questions presented thereby are:

> "1. Whether the highest Vermont court, by refusing to accept petitioner's uncontradicted, corroborated, competent and credible evidence establishing numerous substantial changes of circumstances since the

> 1953 custody decree which required its modification, denied petitioner due process of law;
>
> 2. Whether such court denied full faith and credit to the 1956 Connecticut decree which determined that respondent's former paramour and present husband was unfit to have custody of his own three children;" * * *
>
> (*McKinney v. Kelley*, 26 U. S. L. W. 3284, 3299).

It is now established, as hereinafter appears, that not only did the Vermont Supreme Court refuse "to accept" petitioner's undisputed evidence, including the prior Connecticut decree, *supra*, the Court never in fact even *received* such evidence which was withheld by the Clerk of the trial Court, the Rutland County Court, who is also Clerk of the State Supreme Court for that county (Appendix to Certiorari Petition p. 16).

II.

As appears from the record now on the file herein: on May 20, 1957 a preliminary hearing was held in the County Court at which two so-called "Meacham Exhibits" (Nos. 1 and 2) and three Petitioner's Exhibits were duly received in evidence (Nos. 1, 2 and 3), all relating to the motion of respondent's Vermont attorney of record, Sidney B. Meacham, to withdraw from the cause and the verifications given respondent's Connecticut attorney, Aaron L. Gersten, of the pendency of the Vermont proceedings. The matter was then adjourned by the presiding judge of the County Court to June 18, 1957, respondent was duly notified by the Court to procure a new Vermont attorney and she replied by letter to the Court dated May 29, 1957 that she did not care to appear and defend. The hearing on June 18, 1957 thereafter proceeded as an uncontested matter.

At the hearing on June 18th petitioner offered nine exhibits which were duly received in evidence. One of these was an exemplified copy of the prior Connecticut judgment roll *supra* (Petr.'s Ex. 3, *Kelley v. Kelley,* No. 104,446-J, Connecticut Superior Court for Hartford County), another was a certified copy of the record of respondent's remarriage to her paramour in Connecticut on September 21, 1956 (Petr.'s Ex. 1) and a third was a map or sketch of the area at Andover Lake, Connecticut where the child in question is now held by respondent and her new husband (Petr.'s Ex. 7). The remaining six exhibits were photographs: of petitioner's present house in Vermont (Ex. 2), of his two sons (Ex. 6) including the child in question, of the three small children of the paramour, Kelley (Ex. 5) and of the apartments of respondent at Glastonbury and East Hartford, Connecticut (Exs. 4, 9, 10) where she lived with Kelley over the period January, 1952 to September 21, 1956 under circumstances constituting adultery in Connecticut down to the date of her own divorce on February 3, 1953 (Conn. General Statutes (1949 rev.) Sec. 8545, Certiorari Petition Appendix, p. 33) and fornication thereafter, until her remarriage in 1956. (*id.* Sec. 8553, Cert. Petr. App. p. 33). This evidence was wholly undisputed.

Thereafter, on July 2, 1957 petitioner submitted his Requests for Findings to the County Court, incorporating therein the numerous facts established by the prior Connecticut judgment roll *supra* including the fact that

> "On June 28, 1952 Kelley deserted his own wife, Laura, and their three children, then aged six, three and one respectively."

On July 17, 1957 the County Court made its Findings of Fact (i.e. decision) wherein the exhibits *supra* were

described or referred to (*id.* paras. 2, 13 and 14) and on July 29, 1957 petitioner filed his thirty seven exceptions thereto, Exception (No. 9) was duly taken therein to the trial Court's refusal to find, as requested, the fact of the paramour's prior desertion of his own wife and three small children

> "on the ground that said fact was incontrovertibly established by the duly exemplified copy of the judgment roll of the Superior Court of the sister state of Connecticut in the cause entitled *Kelley v. Kelley*, No. 104,446-J, and, *as such, is entitled to full faith and credit in the Courts of Vermont as required by the full faith and credit clause of the federal constitution and by the Revised Statutes of the United States* (Petitioner's Exhibit 3, June 18, 1957)." (Italics ours.)

III.

Exception was also duly taken to the refusal to find, as requested, that the paramour was represented in the Connecticut action by respondent's Connecticut attorney, Gersten (No. 12), to the refusal of the trial Court to consider three Petitioner's Exhibits, Nos. 1, 2 and 3 (No. 13a) and to its refusal to find the facts of the paramour's unfitness to be the custodian of his own children as determined by the prior Connecticut Court judgment (Requests Nos. 17-21 incl.; Exceptions Nos. 29-33 incl.).

On August 17, 1957 the presiding judge of the County Court certified the entire record to the Vermont Supreme Court, for purposes of review, by a skeleton Bill of Exceptions which provided:

> "The * * * transcript of testimony, exhibits * * * and all other proceedings had herein in said County Court, including the records, files and docket entries herein are referred to and made a part hereof, * * *
>
> The transcript of evidence shall be controlling for the purpose of testing whether the findings and request

for findings are warranted by the evidence and whether there has been any abuse in the exercise of the court's discretion in refusing to find facts as requested to which abuse the petitioner has an exception. Exceptions allowed, further proceedings herein stayed and the cause passed to the Supreme Court, subject to amendment on or before September 1, 1957."

IV.

Notwithstanding this specific direction of the County Court presiding judge, petitioner's nine exhibits *supra* never went to the Vermont Supreme Court at all. This was disclosed, for the first time, on April 2, 1958 by the letter of Norman E. Peduzzi, Clerk of the Vermont Supreme Court, listing the documents he transmitted on that date to Mr. Fey, Clerk of this Court, wherein no mention was made of petitioner's nine exhibits received in evidence on June 18, 1957, although listing the five exhibits *supra* which had been received in evidence on May 20, 1957.

Inquiry promptly made thereupon disclosed that these nine exhibits were still with the County Court Clerk, George N. Harman. On April 11, 1958, he finally transmitted them to Mr. Peduzzi with a letter stating:

> "These exhibits were not shipped to you, with the file of the cause, because this cause going to the Supreme Court for argument on the County Court's dismissal of the libellant's petition to modify the order as to custody as to one of the minor children, *it did not occur to me that these exhibits were necessary for such arguments.*" (Italics ours.)

A carbon copy of this letter is on file herein. Under date of April 14, 1958 the Clerk of the Vermont Supreme Court forwarded the nine exhibits to the Clerk of this Court.

V.

From the foregoing it appears that not only was petitioner's undisputed proof never considered by the highest State Court, *it was not even received there* due to the arbitrary action of the trial Court Clerk who did not consider it was "necessary"—even though it included the judgment roll from a sister state which has now been denied full faith and credit. Petitioner's claim to denial of due process thus is powerfully corroborated by these newly discovered facts.

Since the evidence is undisputed this Court is at liberty to inquire whether it supports the judgment (*Kelley v. Rhoads*, 188 U. S. 1, 5). Likewise, it is submitted that there is no occasion here to evaluate conflicting evidence below, which dissenting opinions have frequently urged as a basis for the dismissal of certiorari writs as improvidently granted. The requirement that full faith and credit be given the Connecticut judgment roll is that it be generous and full, not niggardly. And the sister state judgment embraces all matters that were or could have been fairly decided thereby, including the issue of the fitness of the paramour to have custody.

Lastly, it is submitted that no useful purpose would now be served by ordering a remand to the Vermont Supreme Court with a direction to consider the evidence that was ignored below. Mr. Harman, was not only Clerk of the County Court, he was *also* Clerk of the Supreme Court for Rutland County (Certiorari Petition p. 16) and, as such, subject to all times to its direction and control. Even a cursory examination of the record below would have revealed the exhibits had not been forwarded with the testimony and that one of these voiced vital federal questions of full faith and credit which had been seasonably and squarely presented by exception for review.

Conclusion.

For the foregoing reasons it is submitted that the Petition for a Writ of Certiorari should be granted and this cause reviewed on its merits.

April 23, 1958.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 898

NORTON D. McKINNEY,

Petitioner,

vs.

GEORGIA H. McKINNEY KELLEY,

Respondent.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VERMONT

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OCTOBER TERM, 1957

No. 898

NORTON D. McKINNEY,

Petitioner,

vs.

GEORGIA H. McKINNEY KELLEY,

Respondent.

Motion For Leave To File Petition For Rehearing.

Petitioner respectfully moves for leave to file the annexed petition for rehearing of the order of this Court denying the petition for writ of certiorari in this case because, as is pointed out more fully in the annexed petition, subsequent to the filing of the certiorari petition this Court handed down its decision in *Kovacs v. Brewer*, 356 U. S. ___, 26 U. S. L. W. 4365, No. 200, October Term, 1957, holding that, absent a showing of changed circumstances between the dates of two conflicting custody decrees of sister states, the prior custody decree of the first state is entitled to full faith and credit in the other. In the instant case the prior Connecticut decree of May 29, 1956 denied the paramour of the respondent wife custody of his own three children and he was divorced by his wife on the ground of desertion. Vermont consequently de-

nied such decree full faith and credit when it thereafter determined that respondent and her paramour, who is now her second husband and in privity with her, were in fact fit custodians of petitioner's child although the only intervening circumstance between the two decrees was respondent's remarriage on September 21, 1956 to the ~~paramour~~ paramour who had previously broken up the two homes.

Moreover, it now conclusively appears that petitioner was also denied due process of law by the Vermont Supreme Court as the result of that court's failure even to receive or consider his evidence, including the prior Connecticut judgment roll, which was certified to it for review by the trial judge; also that the state court's determination there had been no "arbitrary disregard" of petitioner's evidence was indeed contrary to the fact. These intervening facts were disclosed only after the filing of the certiorari petition on April 4, 1958.

Lastly, the Court in *Kovacs v. Brewer, supra,* held these matters of conflicting custody decrees of sister states present "difficult and important questions of constitutional law" which were "explicitly" reserved from that decision but which should now be resolved in this case.

A rehearing is respectfully requested in view of the foregoing intervening circumstances of substantial or controlling effect, pursuant to Rule 58(2).

Dated: June 25, 1958.

ALBERT G. AVERY,
Counsel for Petitioner.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 898

NORTON D. McKINNEY,

Petitioner,

VS.

GEORGIA H. McKINNEY KELLEY,

Respondent.

Petition For Rehearing Of Order Denying Petition For Writ of Certiorari.

Petitioner prays that this Court grant rehearing of its order of June 2, 1958 denying the petition for writ of certiorari (356 U. S. ____, 26 U. S. L. W. 3353) and that a writ of certiorari issue to review the judgment of the Vermont Supreme Court in the above entitled case as prayed for in the petition filed April 4, 1958.

Reasons For Granting Rehearing and Issuing The Writ.

1. Rehearing will be granted where there has been an intervening and controlling Supreme Court decision (*Bradley Min. Co. v. Boice*, 345 U. S. 932; *Zap v. United States*, 330 U. S. 800; *Jones v. Opelika*, 316 U. S. 584, 589; *Helvering v. Sprouse*, 316 U. S. 656; *Pickett v. Union Terminal Co.*, 313 U. S. 591, 314 U. S. 704, 315 U. S. 386; *Triplett v. Lowell*, 296 U. S. 570, 621; *Massey v. United States*, 291

U. S. 608, 655, 669). The certiorari petition herein was filed April 4, 1958 and the intervening decision in *Kovacs v. Brewer*, 356 U. S.____, 26 U. S. L. W. 4365, was handed down on May 26, 1958.

2. In *Kovacs* this Court at the outset recognized that "difficult and important questions of constitutional law" were presented by the claim that North Carolina had violated the Full Faith and Credit Clause in refusing to recognize a prior New York custody decree. While remanding the case to North Carolina to ascertain whether there were "changed circumstances" arising between the date of the New York decree and the subsequent contrary decree in North Carolina the Court stated that the constitutional questions thus presented, "we explicitly reserve without expressly or impliedly indicating any views about them." The dissenting opinion however made plain the actual effect of such action when it said (26 L. W. 4368):

> "Whatever may be the Court's formal disavowal, a federal question can be found for review here only if the Court requires, however implicitly, that North Carolina give full faith and credit to the second New York decree. For if the Supreme Court of North Carolina is obliged to find that 'circumstances have changed' since the second New York decree in order not to be bound by it, it *must be that that decree has legal significance under the Full Faith and Credit Clause.*" (Italics ours.)

This is the prevailing rule. See *Restatement: Conflict of Laws*, Sec. 147, comment (a); *Halvey v. Halvey*, 330 U. S. 610, 618; *Ehrenzweig: Interstate Recognition of Custody Decrees*, 51 Mich. L. R. 345, 356-7; *Stumberg: Children and the Conflict of Laws*, 8 U. of Chicago L. R. 42, 57, 58; *Goodrich: Custody of Children in Divorce Suits*, 10 Cornell L. Q. 1, 7:

"The great weight of authority holds that a decree made by a court having jurisdiction awarding custody of the children is conclusive as to all matters up to the time of rendition of the decree and will be recognized and given effect in another state. * * * Ancient history, i. e. matters prior to the first decree, cannot be gone into; and the person seeking to disturb the *status quo* will have to show what new circumstances have arisen calling for a change."

See also: *Goodrich: op. cit.* at pp. 9-10. *Morrill v. Morrill,* 83 Conn. 479 states this is the rule in Connecticut.

3. Here it was established that respondent left her family in Vermont for her paramour, Kelley; that petitioner thereupon divorced her in Vermont in 1953; that she refused to give up Kelley or accord petitioner his visitation rights under the divorce decree;[1] that in consequence Kelley was thereafter divorced by his own wife in Connecticut in 1956 and denied the custody of his own three children. This prior determination by Connecticut that the paramour was an unfit custodian was entitled to recognition and enforcement in Vermont under the Full Faith and Credit Clause, absent a showing of changed circumstances subsequent to the Connecticut decree, and "difficult and important questions of constitutional law" were presented by Vermont's refusal to give it recognition (*Kovacs v. Brewer, supra*). No changed circumstances were shown by respondent to avoid the effect of the Connecticut decree. On the contrary, she defaulted in Vermont and did nothing. Her subsequent marriage to the paramour in 1956 did not constitute a change of circumstances making him a fit custodian of his own children in Connecticut; *a fortiori* it could not be the basis for a subsequent finding in Vermont that he is now a fit cus-

[1] This situation still continues. On May 13, 1958 her Connecticut counsel wrote: "Mrs. McKinney Kelley informs me that she can not consent to Mr. McKinney's request for visitation."

todian for petitioner's child in his present status as respondent's new husband with whom she is now in privity (*Litchfield v. Goodnow,* 123 U. S. 549, 551). The question of her husband's fitness as custodian has been conclusively determined by the Connecticut decree and it is not subject to collateral attack subsequently in Vermont (*Hoag v. New Jersey,* 356 U. S. ____, 26 L. W. 4307, 4309, decided May 19, 1958; *So. Pac. R. R. v. United States,* 168 U. S. 1, 48-49; *Restatement: Judgments,* Secs. 83, 87, 90, 111 comment (a); 1 *Freeman: Judgments* (5th ed.) Sec. 480, p. 1038; *Res Judicata,* 65 Harv. L. R. 861).[2]

4. Not only are these considerations forcibly brought forward by the intervening decision in *Kovacs v. Brewer, supra,* they are emphasized by the further intervening circumstances that since the filing of the certiorari petition it was established that the Connecticut decree and *all* of petitioner's other exhibits were never even delivered to or considered by the Vermont Supreme Court although duly certified there by the trial judge. Even the dissenting opinion in *Kovacs v. Brewer,* 26 L. W. at 4367, while holding that custody decrees were transitory, pointed out:

> "To say this is not to say that a court should pay no attention to a prior decree or to the *status quo* established by it. *These are, of course, among the relevant and even important circumstances that a court should consider when exercising judgment on what the welfare of a child before it requires.*" (Italics ours.)

Thus it cannot be said that the highest Vermont court reviewed *all* the evidence and then based its determination upon an adequate non-federal ground and petitioner's further claim that he was deprived of his federal right to due process by the failure of the state court to consider

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[2] The collateral estoppel division of *res judicata* is included within the Full Faith and Credit Clause (Goodrich C. J. in *United States v. Sillimen,* 167 F. (2) 607, 621, cert. den. 335 U. S. 825, citing *Chicago etc. Ry. Co. v. Schendel,* 270 U. S. 611; *Everett v. Everett,* 215 U. S. 203).

his undisputed proof now stands established and unchallenged. The possible obscurity as to the existence of a non-federal ground for the decision in *Kovacs* which caused the remand of that case for further consideration by the North Carolina Supreme Court of this question does not exist here, as these subsequently discovered facts conclusively establish, consequently the "difficult and important questions of constitutional law" that were explicitly reserved by the Court in *Kovacs* are now ripe for decision here.

5. Under the alternate interpretation of the *Kovacs* decision, set forth in the dissenting opinion *supra*, namely that the prior inconsistent custody decree of a sister state "does have legal significance under the Full Faith and Credit Clause," a substantial federal constitutional question is now plainly and squarely presented for review here. Under either interpretation of the *Kovacs* decision, in view of the existing and increasing welter of confusion, uncertainty and complex problems in custody cases throughout the nation these constitutional questions are serious and important ones which, it is submitted, should be settled in this case by this Court (cf. *Ehrenzweig: Interstate Recognition of Custody Decrees, supra,* 51 Mich. L. R. 345 *et seq.*).

CONCLUSION.

For the reasons above set forth and in the petition for writ of certiorari it is respectfully urged that rehearing be granted and that upon such rehearing a writ of certiorari issue to the Vermont Supreme Court.

Respectfully submitted,

ALBERT G. AVERY,
Counsel for Petitioner.

Certificate Of Counsel.

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58(2) of the rules of this Court.

ALBERT G. AVERY,
Counsel for Petitioner.